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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTER FOR CONSTITUTIONAL RIGHTS, TINA M. FORSTER, GITANJALI S. GUTIERREZ, SEEMA AHMAD, MARIA LAHOOD and RACHEL MEEROPOL,	:	
Plaintiffs,	:	Case No. 06-cv-313
v.	:	Judge Gerard E. Lynch
	:	Magistrate Judge Kevin Fox
GEORGE W. BUSH, President of the United States; NATIONAL SECURITY AGENCY, LTG Keith B. Alexander, CENTRAL INTELLIGENCE AGENCY, Gen. Michael V. Hayden, Director; DEPARTMENT OF HOMELAND SECURITY, Michael Chertoff, Secretary; FEDERAL BUREAU OF INVESTIGATION, Robert S. Mueller, III, Director; and JOHN D. NEGROPONTE, Director of National Intelligence,	:	: **ECF CASE**
Defendants.	:	

MEMORANDUM OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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INTERESTS OF AMICUS CURIAE

The interests of amicus curiae Washington Legal Foundation (WLF) are more fully presented in its motion for leave to file this Memorandum. WLF is a national, non-profit public interest law and policy center, based in Washington, D.C., with supporters nationwide. WLF has devoted substantial resources to national security and separation-of-powers cases over the last 29 years and has appeared as counsel or amicus in numerous such cases in the Supreme Court and lower federal courts. *See, e.g., Goldwater v. Carter*, 444 U.S. 996 (1979); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *MacWade v. Kelly*, No. 05 Civ. 6921, 2005 U.S. Dist. LEXIS 39695 (S.D.N.Y. Dec. 7, 2005) (supporting New York City's container inspection program for city subways to deter terrorist bombing attacks).

The Defendants are asserting the state and military secrets privileges in this case, which likely will preclude the Court from reaching the merits of Plaintiffs' claims that certain warrantless electronic surveillance of international communications by the Defendants is unlawful. While WLF supports the Defendants' assertion of those privileges, which have been determined to be valid in other cases,[1] WLF nevertheless believes it appropriate for the Court to have before it some additional constitutional counterargument to Plaintiffs and their amici regarding the separation-of-powers issues that this case presents. WLF's Memorandum will help place this case in proper constitutional perspective and may, indeed, assist the Court in ruling on the validity of the privileges asserted.

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[1] *See, e.g., El-Masri v. Tenet*, 1:05cv1417, 2006 WL 1391390 (E.D. Va. May 12, 2006) (upholding assertion of state secrets privilege to preclude adjudicating claim by German citizen that he was unlawfully abducted and mistreated by the CIA overseas).

Amicus will focus primarily on the President's constitutional authority to engage in the NSA Program, further described herein, based upon his well-established constitutional foreign affairs authorities and related authorities to gather foreign intelligence. Because of space limitations, amicus will not address Plaintiffs' other arguments, but submit that they must fail.[2]

INTRODUCTION

Following the largest ever foreign attack on American soil, killing over 3,000 civilians on September 11, 2001, the President of the United States made clear to the American public: "We're at war. There has been an act of war declared upon America by terrorists, and we will respond accordingly." President George W. Bush, Remarks at Camp David (Sept. 15, 2001). Shortly thereafter, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States."[3] Two months later, the President determined that al Qaeda and other foreign terrorist organizations "possess[ed] both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of operations of the United States Government." *Military Order* § 1(c), 66 Fed. Reg. 57,833-34 (Nov. 16, 2001).

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[2] For example, even if the merits could be reached, Plaintiffs' Fourth Amendment challenge should be rejected based on voluminous precedent concerning the constitutional analysis of government warrantless surveillance of international electronic communications (which can be, and are, intercepted by foreign countries and other third parties), and the well-recognized "special needs" doctrine. For a fuller discussion of those arguments supporting the legality of the NSA Program, *see* U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency by the President* (Jan. 19, 2006), *available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf (hereinafter "DOJ Memo"); *see also* Andrew C. McCarthy, David B. Rivkin, Lee A. Casey, *NSA's Warrantless Surveillance Program: Legal, Constitutional, and Necessary*, *reprinted in* Federalist Society Monograph, TERRORIST SURVEILLANCE AND THE CONSTITUTION (May 2006), *available at* http://www.fed-soc.org/pdf/terroristsurveillance.pdf at 23-135 (hereinafter "McCarthy Monograph").

[3] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, (2001) (reported as a note to 50 U.S.C.A. § 1541) ("AUMF").

Given the obvious and overriding concern about impending future attacks, and the ongoing threats by al Qaeda to strike at America and its citizens again, both here and abroad, the President authorized the National Security Agency ("NSA") to "intercept *international* communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations." DOJ Memo, *supra* note 2, at 5 (emphasis added). Amicus henceforth will refer to this activity, further described below, as the "NSA Program."

In order to intercept international communications under the NSA Program, the government must have "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda." *Id*. at 5. The purpose of the NSA Program is exclusively to "detect and prevent another catastrophic terrorist attack on the United States" and it is intended for situations in which the government has to "move very, very quickly. FISA, by contrast, is better suited for `long term monitoring.'" *Id*. (internal citations omitted)

The NSA Program has been, and continues to be, "reviewed for legality by the Department of Justice and . . . monitored by the General Counsel and Inspector General of the NSA to ensure that civil liberties are being protected," as well as being "carefully reviewed approximately every 45 days to ensure that [it is] being used properly." *Id*. Finally, Congressional leaders in both political parties, as of January 2006, had "been briefed more than a dozen times on the" NSA Program, and continue to be briefed. *Id*. Plaintiffs have launched a legal attack against the NSA Program, claiming that it violates, *inter alia*, the Foreign Intelligence Surveillance Act (FISA), codified at 50 U.S.C. §§ 1801-62, the constitutional doctrine of separation of powers, the First Amendment, and the Fourth Amendment.

SUMMARY OF ARGUMENT

Under our Constitution, the President of the United States is uniquely charged with the responsibility of protecting our Nation and its people from attack, including attack from international terrorists like those who, on September 11, 2001, conducted the single deadliest attack against civilians on U.S. soil by a foreign enemy in our history. The Constitution vests the President with sufficient authority to carry out this grave, fundamental, and core constitutional responsibility, including through the conduct of foreign intelligence collection operations such as the NSA Program.

Any interpretation of the Foreign Intelligence Surveillance Act (FISA), as applied to the precise facts and circumstances of the NSA Program (which cannot be determined on the present record), that would impair the President's ability to carry out his constitutional responsibilities would render FISA itself unconstitutional under the separation-of-powers doctrine. FISA could not, under such circumstances, constitutionally prevent the President from carrying out the NSA Program to collect foreign intelligence to prevent future terrorist attacks on our country.

ARGUMENT

I. TO THE EXTENT THAT FISA IMPAIRS THE PRESIDENT'S ABILITY TO CONDUCT ELECTRONIC SURVEILLANCE OF INTERNATIONAL COMMUNICATIONS FROM SUSPECTED TERRORISTS TO OR FROM THE UNITED STATES TO PROTECT THE COUNTRY FROM ATTACK, IT VIOLATES THE SEPARATION OF POWERS

In Part III of their Memorandum, Plaintiffs argue that, because the NSA allegedly is engaged in electronic surveillance activities that Congress intended to foreclose when it enacted FISA in 1978, the NSA Program violates the separation of powers. Pl. Mem. at 21-32. The Plaintiffs have it exactly backwards. To the extent that FISA is interpreted as impairing the President's ability to gather timely intelligence, specifically, international electronic communications to or from suspected al Qaeda members, in order to carry out his constitutional responsibilities to protect the United States and its citizens from attack, FISA itself violates the separation of powers by encroaching on the President's well-established constitutional responsibilities and authorities.

As amicus will demonstrate, under Article II of the Constitution, the President has substantial and plenary authorities in foreign affairs and, particularly, in gathering foreign and military intelligence. Those substantial powers are further enhanced by the President's related Commander-in-Chief powers that he possesses in both peace and wartime. All of these powers must, and are, currently being exercised in our ongoing war with al Qaeda, a deadly enemy against whom Congress has authorized the President to use "all necessary and appropriate force." AUMF § 2(a).

A. The Supreme Court Has Consistently Recognized the President's "Plenary" Authority in Foreign Affairs

Over the last 150 years, the Supreme Court has had numerous opportunities to expound on the scope and nature of the President's inherent and exclusive powers, under Article II of the Constitution, to conduct foreign affairs. In 1852, for example, the Court referred to the executive branch as "that department of our government *exclusively* which is charged with our foreign relations." *Kennett v. Chambers*, 55 U.S. 38, 51 (1852) (emphasis added). In *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936), the Court emphatically recognized:

> [the] *delicate, plenary and exclusive power* of the President as the sole organ of the federal government in the field of international relations--*a power which does not require as a basis for its exercise an act of Congress*, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

Id. at 320 (emphasis added). As Justice Sutherland further explained:

> It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.
>
> * * * *
>
> [Congress] must often accord to the President a degree of discretion and freedom of statutory restriction which would not be admissible were domestic affairs alone involved.

Id. at 315, 320. A year later, the Court again recognized that the Executive "had the authority to speak as the sole organ of [the] Government." *United States v. Belmont*, 301 U.S. 324, 330 (1937).

Even Justice Robert Jackson, writing for the Court in *Johnson v. Eistentrager*, 339 U.S. 763 (1950), acknowledged that the President was "exclusively responsible" for the "conduct of diplomatic and foreign affairs." *Id*. at 789. And in the so-called Pentagon Papers case, Justice Stewart, in his concurring opinion joined by Justice White, noted that:

> In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, *largely unchecked by the Legislative and Judicial branches*, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that *a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government*.

New York Times Co. v. United States, 403 U.S. 713, 727-28 (1971) (footnotes omitted) (emphasis added). *See also id*. at 741 (Marshall, J., concurring) ("[I]t is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief."); *id*. at 756, (Blackmun, J., dissenting) ("It is plain . . . that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests."). Finally, in *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988), Justice Blackmun, writing for the majority, reiterated that the "Court has also recognized ‘the generally accepted view that foreign policy was the province and responsibility of the Executive.’" *Id*. at 529.

While it is true that the Congress has certain enumerated powers, under Article I, to declare war, to raise and support the Army, provide for a Navy, and the like, it is the President who -- in addition to his express powers to make treaties, appoint and receive ambassadors, and serve as Commander-in-Chief -- has the plenary and exclusive power to conduct foreign affairs, as intended by the Founders.[4] Accordingly, contrary to the Plaintiffs' arguments, it is the President, not the Congress, who has constitutional primacy over foreign affairs.

B. Foreign Intelligence Collection Operations Lie at the "Core" of the President's Plenary Foreign Affairs Powers

As firmly established is the President's plenary constitutional position in foreign affairs generally, it is even stronger in the conduct of foreign and military intelligence operations.[5]

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[4] For an excellent historical discussion of the Framers' view supporting the President's central responsibility for the conduct of foreign affairs over the power of Congress, see H. Jefferson Powell, *The Founders and the President's Authority Over Foreign Affairs*, 40 Wm. & Mary L. Rev. 1471 (1999). Moreover, the Vesting Clause provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. In sharp contrast, Article I, Section I states only that: "All legislative Powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (emphasis added) The Supreme Court has found this difference important:

> The difference between the grant of legislative power under article 1 to Congress which is limited to powers therein enumerated, and the more general grant of the executive power to the President under article 2, is significant. . . .[T]he executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed. . . .
> * * * *
> [A]rticle 2 grants to the President the executive power of the government . . . [and] the provisions of the second section of article 2, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed, and not to be extended by implication. . . .

Myers v. United States, 272 U.S. 52, 128, 163-64 (1926).

[5] As the Congress recognized in the preamble to the AUMF, "the President has authority under the Constitution to deter and prevent acts of international terrorism against the United States." AUMF pmbl. Clearly, in order to deter and prevent such acts effectively, that authority must necessarily include the timely collection of foreign and military intelligence, particularly during wartime. The Supreme Court apparently agrees:

> We begin the inquiry by noting that the President of the United States has the fundamental duty under Art. II, §1, of the Constitution, to "preserve, protect, and defend the Constitution of the United States." Implicit in that duty is the power to protect our government against those who would subvert or overthrow it by unlawful means.

(continued...)

Our courts have strongly and repeatedly linked the President's inherent foreign affairs power, his duty and power to protect national security, and his Commander-in-Chief power, to his authority over foreign and military intelligence collection operations, including electronic surveillance for foreign intelligence purposes.

In the Civil War-era *Prize Cases*, the Court held that the President had the power, if not the duty, to use force to resist an attack against the United States, even in the absence of authorizing legislation. 67 U.S. 635, 688 (1862). The Supreme Court later held that President Lincoln "was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, *to employ secret agents* to enter the rebel lines *and obtain information respecting the strength, resources, and movements of the enemy*." *Totten v. United States*, 92 U.S. 105, 106 (1875) (emphasis added). No authorizing legislation by the Congress was required to enable the President to spy on the "enemy" -- inside the United States -- who had taken up arms against the Union.

The Supreme Court later recognized the inextricable link between the President's foreign affairs and foreign intelligence powers, and the strong link between those powers and the President's Commander-in-Chief power. In *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), for example, the Court stated:

> [t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.

[5](...continued)
United States v. United States District Court (Keith), 407 U.S. 297, 310 (1972) (emphasis added).

Id. at 111. In *Haig v. Agee*, 453 U.S. 280 (1981), the Court recognized that:

> [i]t is `obvious and unarguable' that no governmental interest is more compelling than the security of the Nation. Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized. Measures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests.

Id. at 307 (citations omitted). As Justice O'Connor stated in 1988: "The functions performed by the Central Intelligence Agency and the Director of Central Intelligence lie at the *core* of `the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.'" *Webster v. Doe*, 486 U.S. 592, 605-06 (1988) (O'Connor, J., concurring in part, dissenting in part) (emphasis added).

Many federal appeals courts which have ruled on the President's authority to conduct foreign intelligence electronic surveillance operations similarly have recognized the President's considerable constitutional powers to collect foreign intelligence to protect our national security. Notably, those courts have stressed the fundamental difference between *purely* domestic cases and those involving the collection of intelligence regarding foreign threats to our nation's security (such as the instant case), and have looked with disfavor on legislative restrictions on the latter.

Twenty years after *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), the court in *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), upheld the President's inherent constitutional authority to authorize warrantless wiretaps for foreign intelligence purposes. The Fifth Circuit explained its holding as follows:

> [B]ecause of the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs, *we reaffirm. . . that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence. Restrictions upon*

> *the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere.* Our holding . . . is buttressed by a thread which runs through the Federalist Papers: that the President must take care to safeguard the nation from possible foreign encroachment, whether in its existence as a nation or in its intercourse with other nations. See e.g., The Federalist No. 64, at 434-36 (Jay); The Federalist No. 70, at 471 (Hamilton); The Federalist No. 74 at 500 (Hamilton) (J. Cooke ed. 1961).

Id. at 426 (emphasis added) (citations omitted).[6]

Similarly, in *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974), the Court noted that while the "Constitution contains no express provision authorizing the President to conduct surveillance . . . it would appear that such power is . . . implied from his duty to conduct the nation's foreign affairs." *Id*. at 603. In reaffirming the legality of warrantless foreign intelligence electronic surveillance, the *Butenko* court further noted:

> [F]oreign intelligence gathering is a clandestine and highly unstructured activity, and the need for electronic surveillance often cannot be anticipated in advance. Certainly occasions arise when officers, acting under the President's authority, are seeking foreign intelligence information, *where exigent circumstances would excuse a warrant*. To demand that such officers be so sensitive to the nuances of complex situations that they must interrupt their activities and rush to the nearest available magistrate to seek a warrant would seriously fetter the Executive in the performance of his foreign affairs duties.

Id. at 605 (emphasis added).

Perhaps most directly relevant to the instant case is the Fourth Circuit's decision in *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980). Although adjudicating a pre-FISA fact pattern, the *Truong* court was well aware of FISA's passage as it discussed the important policy considerations in deciding separation-of-powers questions regarding congressional restrictions on the President's foreign intelligence gathering powers.

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[6] The passage of FISA, and the nearly 30 years since, in no way undermines the reasoning of the *Brown* court, and other authorities cited herein, as to the constitutional and practical reasons for Presidential primacy in this area.

> For several reasons, the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, [*United States v. U.S. Dist. Ct.*, 407 U.S. 297 (1972)] "unduly frustrate" the President in carrying out his foreign affairs responsibilities. First of all, attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy. A [uniform] warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, [and] in some cases delay executive response to foreign intelligence threats. . . .
>
> * * * *
>
> Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs . . . . Just as the separation of powers in *Keith* forced the executive to recognize a judicial role when the President conducts domestic surveillance, so the separation of powers requires us to acknowledge the *principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance*.

Id. at 913-14 (emphasis added) (citations omitted).[7]

Finally, it is instructive that the special Foreign Intelligence Court of Review recognized in a post-FISA, and post-September 11, case, that:

> [t]he *Truong* court, as did all the other courts to have decided the issue, held that the President did have the inherent authority to conduct warrantless searches to obtain foreign intelligence information. . . . We take for granted that the President does have that authority and, assuming that is so, *FISA could not encroach on the President's constitutional power*.

In re Sealed Case, No. 02-001, 310 F.3d 717, 745 (FISA Ct. Rev. 2002) (emphasis added). In rejecting a Fourth Amendment argument made by the ACLU as amicus in that case, the Court of Review held that FISA, as amended by the PATRIOT Act, was constitutional, "*[e]ven*

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[7] As Plaintiffs acknowledge, the Supreme Court in *Keith*, referred to in *Truong*, emphasized that the case "involve[d] only the domestic aspects of national security. We have not addressed, *and express no opinion* as to the issues which may be involved with respect to activities of foreign powers or their agents." 407 U.S. at 321-22 (footnote omitted, citing to authority for the proposition that "warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved.") (emphasis added).

without taking into account the President's inherent constitutional authority to conduct warrantless foreign intelligence surveillance." *Id*. at 746 (emphasis added).

Accordingly, amicus submits that the President's constitutional authority to conduct foreign intelligence surveillance under the NSA Program is well established.

C. Plaintiffs' Reliance on Justice Jackson's Concurring Opinion in *Youngstown* as Trumping the President's Power to Collect Foreign Intelligence under the NSA Program is Misplaced

Plaintiffs rely heavily on Justice Jackson's concurring opinion in *Youngstown Sheet & Tube*, 343 U.S. 579, 592 (1952) (Jackson, J., concurring), to support their argument that the NSA Program violates the separation of powers by allegedly violating FISA's requirements. Pl. Mem. at 22-25. Assuming, *arguendo*, that the terms of FISA apply to the NSA Program,[8] amicus submits that Plaintiffs' reliance on *Youngstown* is misplaced and, in any event, not dispositive of the instant case.

1. Plaintiffs' Interpretation of Justice Jackson's *Youngstown* Concurrence is Fatally Flawed

Plaintiffs' argument goes essentially as follows: Congress has certain substantial constitutional authorities under Article I, including those relating to war powers, foreign affairs, and foreign intelligence gathering, and enacted FISA allegedly pursuant to those authorities. Congress intended the procedures of FISA to be the “exclusive means” governing all government electronic surveillance for foreign intelligence collection purposes. Therefore,

[8] *See McCarthy Monograph*, *supra* note 2, at 54-60 (concluding that FISA need not be invalidated in order to uphold the NSA Program, inasmuch as a careful parsing of the FISA provisions themselves -- both with respect to who is covered and what electronic communications are covered -- reveal that they are rather narrow, particularly those provisions that incorporate a "reasonable expectation of privacy" standard, since, arguably, it is not "reasonable" to expect international electronic communications to be private).

despite the President's "core" powers under Article II in this area, he has "violated the law" because he authorized electronic surveillance of international communications with suspected al Qaeda agents without obtaining a FISA order, which, although not technically a warrant, is functionally equivalent to one.

To support this flawed syllogism (even assuming the dubious proposition that Congress has substantial foreign intelligence authorities), Plaintiffs principally rely on Justice Jackson's oft-cited concurring opinion in *Youngstown Sheet & Tube v. Sawyer,* 343 U.S. 579 (1952), where the Court was faced with a challenge to President Truman's order to have the federal government take possession and control of the Nation's steel mills during the Korean conflict. In his attempt to ensure a reliable supply of steel for the war effort in light of a looming labor strike, President Truman chose not to invoke certain statutes that dealt with seizure of property and the settlement of labor disputes. *Id*. at 582-83.

Justice Jackson assayed the constitutional powers of the President as follows: In the so-called "Zone 1," where a President acts pursuant to an express or implied authorization by Congress, the President's power is at its "zenith" because he exercises not only his own constitutional powers, but "all that Congress can delegate." *Id*. at 635. In "Zone 2," where Congress has not spoken in a particular area, the President is in a "zone of twilight" and must rely upon his constitutional powers alone. *Id*. at 637. Finally, in "Zone 3," where the President's actions are "incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id*.

Plaintiffs assert that the NSA Program must fall into Zone 3, based on (1) their reading of FISA's exclusivity provision, and (2) their rejection of any argument that the AUMF *is* a statutory augmentation of the President's own constitutional powers in the area of foreign intelligence electronic surveillance. Even if the NSA Program falls under Zone 3, the President's authority in this case must be sustained based upon a proper application of the *Youngstown* opinion and subsequent separation-of-powers cases.

2. Even if the President's Constitutional Authority is in Zone 3, It is Not Extinguished

Even if the President is exercising powers that are incompatible with "the expressed or implied will of Congress," that does not mean he has acted unlawfully. According to Justice Jackson, the President may still rely "upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id*. This statement would make no sense unless Justice Jackson contemplated circumstances in which powers that are exercised, even at this "lowest ebb," were still sufficiently robust to sustain the constitutionality of the President's action in the teeth of contrary legislation.

More importantly, even if Congress had some constitutional powers with respect to the general subject matter under scrutiny, a proper balancing of those interests by a court would recognize the primacy of presidential power over congressional power in the area of foreign affairs and, particularly, foreign intelligence collection. If it were otherwise, then the Congress could, for example: by virtue of its power to ratify treaties, control negotiations with foreign governments;[9] by virtue of its authority to declare war, prevent a President from using military

[9] *See, e.g.*, *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652 (9th Cir. 1993) ("The district court correctly ruled that the section 609(a) claims relate to 'the foreign affairs function, which rests within the exclusive province of the Executive Branch under Article II, section 2 of the United States Constitution.' The statute's requirement that the Executive initiate discussions with foreign nations
(continued...)

force to respond to an overseas attack on Americans;[10] or, by virtue of its authority to make rules for the Army and Navy, prohibit the President, as Commander-in-Chief, from holding courts martial for military personnel.[11] In each of these circumstances, the judiciary and/or executive branch legal opinions have wisely rejected, as unconstitutional, exercises of Congress's power that impair the President's ability to carry out his constitutionally assigned responsibilities, even though Congress clearly had some articulable constitutional authority in the areas at issue. So too is the case here.

Taken to its logical extreme, the Plaintiffs' position, if adopted, would fundamentally alter the system of separation of powers and checks and balances created by our Constitution, transforming our governmental system into one in which Congress alone reigns supreme in virtually all spheres of the exercise of governmental power.

3. ***Youngstown* is Further Distinguishable Because It was Principally a Domestic Case, Whereas the NSA Program is Principally a Foreign Affairs Activity**

Plaintiffs' attempt to apply Justice Jackson's analysis to a case that primarily involves foreign affairs and foreign intelligence, as does the case at bar, is even further off the mark. A cursory reading of *Youngstown* makes clear that, although the executive/congressional conflict

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[9](...continued)
violates the separation of powers, and this court cannot enforce it").

[10] With respect to the War Powers Resolution, 50 U.S.C. § 1541(c), the Executive Branch under both parties has taken the position that "the President's power to deploy armed forces into situations of actual or indicated hostilities is not restricted to the three categories specifically marked out by the [War Powers] Resolution." Proposed Deployment of United States Armed Forces Into Bosnia, 19 Op. Off. Legal Counsel OLC 327 (1995) (citing Overview of the War Powers Resolution, 8 Op. Off. Legal Counsel 271, 274-75 (1984)).

[11] *United States v. Eliason*, 41 U.S. 291, 301 (1842) ("The power of the executive to establish rules and regulations for the government of the army, is undoubted.")

at issue in that case unfolded against the backdrop of the Korean War, the legal and factual issues at stake were far more “domestic” in nature than those raised by the NSA Program.

As noted, *Youngstown* involved President Truman’s order to seize and control private U.S. steel mills after the failure of the industry and unions to reach a collective bargaining agreement. 343 U.S. at 582-84. In striking down President Truman’s attempted seizure of the steel mills by executive order, rather than following legislation dealing with emergencies, the *Youngstown* Court described the powers of Congress as follows: "It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy." *Id*. at 588. Even Justice Jackson recognized the primarily "domestic" nature of the case, when he cautioned:

> We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander-in-Chief. *I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world* for the security of our society. But, when it is turned inward, not because of rebellion *but because of a lawful economic struggle between industry and labor,* it should have no such indulgence.

Id. at 645 (emphasis added).[12]

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[12] Unlike the relatively long time delay involved in the production of steel before it can be put to military use, such as manufacturing a military vehicle or ship, the interception of vital and useful foreign intelligence to detect and prevent a terrorist attack often requires rapid and immediate action. Indeed, in a post September 11 world, the action required may be more rapid and immediate than FISA can accommodate. It is impossible for this or any court to determine, in the absence of specific facts and circumstances, whether FISA, as applied to the NSA Program, unconstitutionally impairs the President's ability to carry out of his constitutional responsibilities. One example, however, of how FISA could impair the collection of timely intelligence is the obvious impossibility of gathering sufficient information about a one-time, in-progress, short-duration terrorism warning phone call, and preparing it for submission to, and approval by, the FISA Court (or, for emergency authorization, the Attorney General) in time to intercept the contents of the call.

More generally, since the NSA Program was disclosed, experts have given other explanations

(continued...)

Accordingly, courts have long recognized –- both before and after *Youngstown* -- that separation-of-powers conflicts between the Congress and the President raising primarily foreign affairs and national security issues must be analyzed differently than cases like *Youngstown*, which principally involved a domestic issue, but having only indirect or incidental implications for the exercise of the President's foreign affairs and Commander-in-Chief powers. As one court cautioned:

> Several important factors must be considered in order to understand the impact of [*Youngstown*]. . . . [A]lthough the executive had argued that the seizures were related to the war power, in essence the President was obtruding into the field of labor relations, an area traditionally assigned to the Congress. Even though the nationalization and the Court's injunction of the President's action might have had some, although indirect, effect on the foreign relations of this country, such import, if any, would have been clearly minimal compared to the drastic change which nationalization by the President would otherwise have brought about in the free enterprise system. Contrasting…[*Youngstown*] with *Curtiss-Wright*, for example, clearly reveals the different set of considerations raised by foreign relations cases.

Atlee v. Laird, 347 F.Supp. 689, 701-02 (E.D. Pa. 1972), *aff'd*, 411 U.S. 911 (1973) (emphasis added) (footnotes omitted).

As previously noted, in *United States v. Brown*, the Fifth Circuit, in upholding the

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[12](...continued)
for the incompatibility of FISA's procedural strictures with the reality of the post-September 11, 2001 world. *See, e.g.*, K. A. Taipale, *Whispering Wires and Warrantless Wiretaps: Data Mining and Foreign Intelligence,* N.Y.U. Rev. of L. & Sec., No. VII Suppl. Bull. on L. & Sec. (Spring 2006) (forthcoming, currently available at http://whisperingwires.info/) (FISA is "inadequate to address recent technology developments, including: the transition from circuit-based to packet-based communications; the globalization of communications infrastructure; and the development of automated monitoring techniques, including data mining and traffic analysis.") *citing* Richard A. Posner, *Commentary: A New Surveillance Act,* Wall St. J. A16 (Feb. 15, 2006) (FISA is "hopeless as a framework for detecting terrorists. [FISA] requires that surveillance be conducted pursuant to warrants based on probable cause to believe that the target of surveillance is a terrorist, when the desperate need is to find out who is a terrorist."). In short, in order "to connect the dots," one must first collect the dots, a task extremely difficult or impossible today under all the 1978 procedures of FISA.

President's inherent constitutional authority to order warrantless foreign intelligence wiretaps, recognized that "[r]estrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere." 484 F.2d 418, 426 (5th Cir. 1973). Furthermore, as Chief Justice Warren Burger noted in *Goldwater v. Carter*, 444 U.S. 996 (1979):

> The present case [challenging the authority of the President to unilaterally terminate a mutual defense treaty] differs in several important respects from *Youngstown* . . . cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown,* private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, *an action of profound and demonstrable domestic impact*. . . . Moreover, as in *Curtiss-Wright* the effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of foreign affairs."

Id. at 1004-05 (Burger, C.J., concurring) (emphasis added) (citations omitted).

In primarily foreign affairs/national security cases, such as the instant one, greater deference must be given the President's constitutional authority vis-a-vis the expression of congressional will on the subject. This fundamental difference between the powers asserted in *Youngstown* and the NSA Program eviscerates the Plaintiffs' separation-of-powers argument.[13]

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[13] In addition to *Youngstown*, Plaintiffs cite *Little v. Barreme*, 6 U.S. 170 (1804) for the proposition that the Supreme Court has "rejected the President's power to act" where his actions (seizing boats sailing *from* French ports where Congress authorized only the seizure of boats sailing *to* French ports) were "unauthorized or prohibited by Congress." Pl. Mem. at 25. For at least three reasons, *Barreme* provides no support for Plaintiffs' position. First, it appears clear that the Executive Branch in *Barreme* was attempting to *comply with the Act*, but made a mistake by including supplemental instructions to seize ships sailing *to* French ports. 6 U.S. at 178. This is reinforced by the fact that "a copy of the act was transmitted by the secretary of the navy, to the captains of armed vessels, *who were ordered to consider* [the Act] *as a part of their instructions*." *Id*.

Second, much like the situation in *Youngstown*, the congressional limitations in *Barreme* dealt with activities primarily committed to the Congress in the text of the Constitution itself. These include the powers to: "regulate commerce with foreign nations, and among the several states, and with the Indian tribes," Art. I, § 8, cl. 3; "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations," Art. I, § 8, cl. 10; and "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Art. I, § 8, cl. 11. Plaintiffs do (continued...)

D. FISA, if Applied to the NSA Program, Would Violate Separation of Powers by Encroaching on the President's Constitutional Authorities

Even if Congress has attempted to occupy the field for intercepting international communications through FISA as the "exclusive means," and the President's exercise of his constitutional authority in this area is at its "lowest ebb," FISA is unconstitutional as applied if FISA impermissibily interferes with the proper execution of the President's own authorities and responsibilities as Chief Executive, Commander-in-Chief, and "sole organ" of international relations (an issue this Court likely cannot resolve as a factual matter due to the invocation of the state and military secrets privilege). Rather than the simplistic bright-line approach urged by Plaintiffs to decide separation-of-powers cases, the Court, post-*Youngstown*, has repeatedly made clear that a balancing-of-powers approach must be used.[14]

In *Nixon v. Adm'r of General Services*, 433 U.S. 425 (1977), for example, the Court held that "in determining whether [a legislative] Act disrupts the proper balance [of power] between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the executive from accomplishing its constitutionally assigned functions." *Id*. at 443. In *Public Citizen v. United States*, 491 U.S. 440 (1989), the Supreme Court was faced with the issue of whether the Federal Advisory Committee Act (FACA), which established procedures by which

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[13](...continued)
not, as they cannot, assert any such explicit constitutional authorities for Congress in the realm of foreign intelligence collection.

Finally, the fact that there are *exceptions* to the President's general constitutional primacy in foreign affairs -- which are explicitly spelled out in the Constitution itself and are to be narrowly construed -- only proves the rule of the President's general primacy. Thus, *Barreme* is irrelevant to a separation-of-powers assessment of the NSA Program which amicus have demonstrated lies at the "core" of the President's constitutional authorities, and not within the authorities of Congress.

[14] Indeed, even Justice Jackson admitted that his own tripartite categorization of presidential powers was "somewhat oversimplified." *Youngstown*, 343 U.S. at 635.

the Executive branch utilizes private advisory committees, was constitutional *as applied* to a putative private advisory committee formed by the American Bar Association (ABA) that advised the President on the qualifications of potential federal judicial nominees. Under Article II, the President has the power to appoint judges, but the Senate also has a clear and important advise and consent power. At first blush, the legislative branch would seem to have constitutional authority over that shared power, in addition to the Necessary and Proper Clause, to require minimum open government procedures in the manner in which the advisory committee provides advice to the President on the qualification of judicial candidates under consideration for nomination by the President. The majority in *Public Citizen* recognized that applying FACA in this context, however, raised serious separation-of-powers questions, and, invoking the constitutional avoidance doctrine, ruled that Congress intended to have FACA apply only to advisory committees that were established or controlled by the Executive. *Id.* at 461. Accordingly, because the ABA committee was not established or controlled by the Executive, FACA did not apply in that case.

Justice Kennedy, however, joined by then-Chief Justice Rehnquist and Justice O'Connor, all concurring in the result,[15] found it necessary to reach the constitutional question, and stated that applying FACA to the manner in which the President obtains advice on potential nominees would violate the separation of powers:

> In some of our more recent cases involving the powers and prerogatives of the President, we have employed something of a balancing approach, asking whether the statute at issue prevents the President 'from accomplishing [his] constitutionally assigned functions' . . . . and whether the extent of the intrusion on the President's

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[15] Justice Scalia recused himself from the case, apparently because he previously opined on the matter years earlier as Assistant Attorney for the Office of Legal Counsel, concluding that FACA, as applied to the ABA committee, did violate the separation of powers.

> powers "is justified by an overriding need to promote objectives within the constitutional authority of Congress."

Id. at 484 (1989) (citing *Nixon v. Adm'r of General Services*). Applying FACA to the appointments process surely would not prevent the President from nominating whomever he chose to be a federal judge. Nevertheless, Justice Kennedy recognized that FACA's impairment of the exercise of even a small part of that presidential power -- namely, the ability to receive unfettered advice from the private sector in the aid of his appointment power -- was sufficient to disable the legislative branch from regulating the exercise of the President's power. *Id.* at 482-88. In the instant case, it cannot be seriously doubted that applying FISA to preclude the NSA Program would impair the execution of a core constitutional duty of the President to a much greater degree than would be the case of applying FACA to the ABA advisory committee.

Finally, in *Clinton v. Jones*, 520 U.S. 681 (1997), the Supreme Court reiterated that a violation of the separation of powers is measured by determining whether the action rises "to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Id.* at 702.

The constitutional power of the President to gather and share intelligence information also has been recognized by the prior Administration with regard to a statutory preclusion on the sharing of intelligence information gleaned from a criminal wiretap set up under Title III.[16] As aptly summarized in an Office of Legal Counsel Opinion:

In extraordinary circumstances electronic surveillance conducted pursuant to Title III

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[16] Precisely like FISA, Title III prescribes criminal penalties for violating its provisions. 18 U.S.C. § 2511.

> may yield information of such importance to national security or foreign relations that the President's constitutional powers will permit disclosure of the information to the intelligence community notwithstanding the restrictions of Title III. . . . [T]he Constitution vests the President with responsibility over all matters within the executive branch that bear on national defense and foreign affairs, including, where necessary, the collection and dissemination of national security information. Because "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation, ". . . the President has a powerful claim, under the Constitution, to receive information critical to the national security or foreign relations and to authorize its disclosure to the intelligence community. *Where the President's authority concerning national security or foreign relations is in tension with a statutory rather than a constitutional rule, the statute cannot displace the President's constitutional authority and should be read to be "subject to an implied exception in deference to such presidential powers." Rainbow Navigation, Inc. v. Department of the Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.). We believe that, if Title III limited the access of the President and his aides to information critical to national security or foreign relations, *it would be unconstitutional as applied in those circumstances.*

Sharing Title III Electronic Surveillance Material With the Intelligence Community, Op. Off. Legal Counsel, 2000 WL 33716983 at 9 (Oct. 17, 2000) (emphasis added) (internal citations omitted). And even the legislative history of FISA indicates that Congress recognized that its "exclusive" procedural mechanism for foreign electronic surveillance "does not foreclose a different decision by the Supreme Court." H.R. Conf. Rep. No. 95-1720, at 35, reprinted in U.S.C.C.A.N. 4048, 4064.

FISA, as Plaintiffs would have it apply, would severely impair the Executive "from accomplishing its constitutionally assigned function." Accordingly, amicus submits that, even if the merits of this case can be reached, it is FISA, as applied, and not the NSA Program, which violates the separation of powers.

CONCLUSION

While it is true, as Plaintiffs claim, that a "state of war is not a blank check for the President," *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality op.), it is also true, as

Justice Jackson warned, that the courts should not "convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. Chicago*, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting). From the limited information available about the NSA Program, WLF submits that it is well within the President's constitutional authorities to carry out such limited electronic surveillance of suspected terrorists who would attack this Nation and kill its citizens. In any event, this Court cannot grant the Plaintiffs' Motion for Partial Summary Judgment without knowing the facts and circumstances of the NSA Program.

Respectfully submitted,

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